

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
ELKINS

FILED
JAN 25 2016
U.S. DISTRICT COURT
ELKINS WV 26241

TIMOTHY JUSTON WIMER,

Petitioner-Defendant,

v.

CIVIL ACTION NO. 2:15-CV-2
CRIM. ACTION NO. 2:13-CR-27-1
(BAILEY)

UNITED STATES OF AMERICA,

Respondent-Plaintiff.

ORDER ADOPTING REPORT AND RECOMMENDATION

On this day, the above-styled matter came before this Court for consideration of the Report and Recommendation of United States Magistrate Judge James E. Seibert [Civ. Doc. 8 / Crim. Doc. 72]. Pursuant to this Court's Local Rules, this action was referred to Magistrate Judge Seibert for submission of a proposed report and a recommendation ("R&R"). Magistrate Judge Seibert filed his R&R on January 6, 2016, wherein he recommends this Court grant the 28 U.S.C. § 2255 petition insofar as counsel failed to file a Notice of Appeal on his behalf.

Pursuant to 28 U.S.C. § 636(b)(1)(c), this Court is required to make a *de novo* review of those portions of the magistrate judge's findings to which objection is made. However, the Court is not required to review, under a *de novo* or any other standard, the factual or legal conclusions of the magistrate judge as to those portions of the findings or recommendation to which no objections are addressed. ***Thomas v. Arn***, 474 U.S. 140,

150 (1985). In addition, failure to file timely objections constitutes a waiver of *de novo* review and the right to appeal this Court's Order. 28 U.S.C. § 636(b)(1); **Snyder v. Ridenour**, 889 F.2d 1363, 1366 (4th Cir. 1989); **United States v. Schronce**, 727 F.2d 91, 94 (4th Cir. 1984). Here, objections to Magistrate Judge Seibert's R&R were due within fourteen (14) days of receipt, pursuant to 28 U.S.C. § 636(b)(1) and Fed.R.Civ.P. 72(b). To date, no party has objected. Accordingly, this Court will review the R&R for clear error.

Therefore, upon careful review of the above, it is the opinion of this Court that:

1. The Magistrate Judge's January 6, 2016, Report and Recommendation [**Civ. Doc. 8 / Crim. Doc. 72**] is **ADOPTED**;
2. The Magistrate Judge's July 20, 2015, Report and Recommendation [**Civil Doc. 6 / Crim. Doc. 63**] is **ADOPTED**;
3. The original Judgment and Commitment Order [**Crim. Docs. 35 & 36**] is **VACATED** and petitioner shall be **RESENTENCED** for the sole purpose of resetting the time to file a Notice of Appeal;
4. Petitioner's § 2255 [**Civ. Doc. 1 / Crim. Doc. 47**] is hereby **GRANTED IN PART** as to petitioner's claim of ineffective assistance of counsel with regard to counsel's failure to file a Notice of Appeal on behalf of petitioner;
5. Petitioner's § 2255 [**Civ. Doc. 1 / Crim. Doc. 47**] is hereby **DENIED IN PART** as to the remainder of petitioner's claims of ineffective assistance of counsel;
and
6. A separate order setting the date and time of petitioner's resentencing will

follow.

It is so **ORDERED**.

The Clerk is directed to transmit copies of this Order to any counsel of record and to mail a copy to the *pro se* petitioner.

DATED: January 25, 2016.

A handwritten signature in black ink, appearing to read "John Preston Bailey", written over a horizontal line.

JOHN PRESTON BAILEY
UNITED STATES DISTRICT JUDGE